4-0800-3340-1

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE MINNESOTA CHARITABLE GAMBLING CONTROL BOARD

In the Matter of the Proposed Adoption of the Rules of the Minnesota Charitable Gambling Control Board Amending Existing Rules

REPORT OF THE CHIEF ADMINISTRATIVE LAW JUDGE

The above-entitled matter came on for review by the Chief Administrative Law Judge pursuant to the provisions of Minn. Stat. 14.15, subds. 3 and 4, which provide:

> Subd. 3. Finding of substantial change. If the administrative law judge's report contains a finding that a rule has been modified in a way which makes it substantially different from that which was originally proposed, or that the agency has not met the requirements of sections 14.131 to 14.18, it shall be submitted to the chief administrative law judge for approval. If the chief administrative law judge approves the finding of the administrative law judge, the chief administrative law judge shall advise the agency and the revisor of statutes of actions which will correct the defects. The agency shall not adopt the rule until the chief administrative law judge determines that the defects have been corrected.
>
> Subd. 4. Need or reasonableness not established. If the chief administrative law judge determines that the need for or reasonableness of the rule has not been established pursuant to section 14.14, subdivision 2, and if the agency does not elect to follow the suggested actions of the chief administrative law judge to correct that defect, then the agency shall submit the proposed rule to the legislative commission to review administrative rules for the commission's advice and comment. The agency shall not adopt the rule until it has received and considered the advice of the commission. However, the agency is not required to delay adoption longer than 30 days after the commission has received the agency's submission. Advice of the commission shall not be binding on the agency.

Based upon a review of the record in this proceeding, the Chief Administrative Law Judge hereby approves the Report of the Administrative Law Judge in all respects.

In order to correct the defects enumerated by the Administrative Law Judge, the agency shall either take the action recommended by the Administrative Law Judge or reconvene the rule hearing if appropriate. If the agency chooses to reconvene the rule hearing, it shall do so as if it is initiating a new rule hearing, complying with all substantive and procedural requirements imposed on the agency by law or rule.

If the agency chooses to take the action recommended by the Administrative Law Judge, it shall submit to the Chief Administrative Law Judge a copy of the rules as initially published in the State Register, a copy of the rules as proposed for final adoption in the form required by the State Register for final publication, and a copy of the agency's Findings of Fact and Order Adopting Rules. The Chief Administrative Law Judge will then make a determination as to whether the defects have been corrected and whether the modifications in the rules are substantial changes.

Should the agency make changes in the rules other than those recommended by the Administrative Law Judge, it shall also submit the complete record to the Chief Administrative Law Judge for a review on the issue of substantial change.

Dated: July _11 1989.

WILLIAM G. BROWN
Chief Administrative Law Judge

4-0800-3340-1

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE MINNESOTA CHARITABLE GAMBLING CONTROL BOARD

In the Matter of the Proposed Adoption of the Rules of the Minnesota Charitable Gambling Control Board Amending Existing Rules

REPORT OF THE ADMINISTRATIVE LAW JUDGE

The above-entitled matter came on for hearing before Administrative Law Judge Peter C. Erickson at 9:00 a.m. on Thursday, May 18, 1989 at McGuires Inn and Restaurant, 1201 West County Road E, Arden Hills, Minnesota. This Report is part of a rule hearing proceeding, held pursuant to Minn. Stat. 14.131 - 14.20 to determine whether the Agency has fulfilled all relevant substantive and procedural requirements of law, whether the proposed rules are needed and reasonable, and whether or not the rules, if modified, are substantially different from those originally proposed.

Mary B. Magnuson, Special Assistant Attorney General, 200 Ford Building, 117 University Avenue, St. Paul, Minnesota 55155, appeared on behalf of the Minnesota Charitable Gambling Control Board. Roger Franke, Director of Gaming for the Minnesota Department of Revenue, appeared and testified in support of the proposed rules. The hearing continued until all interested groups and persons had an opportunity to testify concerning the adoption of the proposed rules.

The Minnesota Charitable Gambling Control Board must wait at least five working days before taking any final action on the rules; during that period, this Report must be made available to all interested persons upon request.

Pursuant to the provisions of Minn. Stat. 14.15, subds. 3 and 4, this Report has been submitted to the Chief Administrative Law Judge for his approval. If the Chief Administrative Law Judge approves the adverse findings of this Report, he will advise the Board of actions which will correct the defects and the Board may not adopt the rule until the Chief Administrative Law Judge determines that the defects have been corrected. However, in those instances where the Chief Administrative Law Judge identifies defects which relate to the issues of need or reasonableness, the Board may either adopt the Chief Administrative Law Judge's suggested actions to cure the defects or, in the alternative, if the Board does not elect to adopt the suggested actions, it

A Reorganization Order issued by the Governor on August 19, 1988, transferred many of the functions of the Charitable Gambling Board to the

Minnesota Department of Revenue.

must submit the proposed rule to the Legislative Commission to Review Administrative Rules for the Commission's advice and comment.

If the Board elects to adopt the suggested actions of the Chief Administrative Law Judge and makes no other changes and the Chief Administrative Law Judge determines that the defects have been corrected, then the Board may proceed to adopt the rule and submit it to the Revisor of Statutes for a review of the form. If the Board makes changes in the rule other than those suggested by the Administrative Law Judge and the Chief Administrative Law Judge, then it shall submit the rule, with the complete record, to the Chief Administrative Law Judge for a review of the changes before adopting it and submitting it to the Revisor of Statutes.

When the Board files the rule with the Secretary of State, it shall give notice on the day of filing to all persons who requested that they be informed of the filing.

Based upon all the testimony, exhibits and written comments, the Administrative Law Judge makes the following:

FINDINGS QF_FACT

Procedural Requirements

1. On March 16, 1989, the Board filed the following documents with the Chief Administrative Law Judge:

(a) A copy of the proposed rules certified by the Revisor of Statutes.
(b) The Order for Hearing.
(c) The Notice of Hearing proposed to be issued.
(d) A Statement of the number of persons expected to attend the hearing and estimated length of the Agency's presentation.
(e) The Statement of Need and Reasonableness.
(f) A Statement of Additional Notice.

2. On April 10, 1989, a Notice of Hearing and a copy of the proposed rules were published at 13 State Register pages 2399-2416. "Dual" notices were published, stating an intent to adopt the proposed rules without a public hearing if 25 or more requests for a hearing were not received. However, because the requisite number of requests for a hearing were received by the Board within the time limit, this hearing was held.

3. On April 3, 1989, the Board mailed the Notice of Hearing to all persons and associations who had registered their names with the Board for the purpose of receiving such notice.

4. On April 21, 1989, the Board filed the following documents with the Administrative Law Judge:

(a) The Notice of Hearing as mailed.
(b) The Agency's certification that its mailing list was accurate and complete.

(c) The Affidavit of Mailing the Notice to all persons on the Agency's list.
(d) An Affidavit of Additional Notice.
(e) The names of Board personnel who will represent the Agency at the hearing together with the names of any other witnesses solicited by the Agency to appear on its behalf.
(f) A copy of the State Register containing the proposed rules.
(g) All materials received following a Notice of Intent to Solicit Outside Opinion published at 12 State Register page 2311 (April 18, 1988) and a copy of the Notice.

The documents were available for inspection at the Office of Administrative Hearings from the date of filing to the date of the hearing.

5. The period for submission of written comment and statements remained open through June 7, 1989. The hearing record closed on June 12, 1989, at the end of the third business day following the close of the comment period.

Statutorv Authority

6. Statutory authority to promulgate the proposed rules is found at Minn. Stat. 349.151, subd. 4 (1988) as amended by 1989 Laws, ch. 334, art. 2, 17.

Small Business Requirements

7. On page 34 of the Statement of Need and Reasonableness, the Board states:

> The proposed amendments to the gambling rule may impact certain small businesses. However, the rule does not effect [sic] small businesses disproportionately nor does the rule prevent small businesses from participating in the gambling industry. The board has fully considered the impact of the amendments on small businesses and has determined that because of the importance on [sic] maintaining integrity in the industry, the board cannot be less rigorous in its regulation of one type of business over another.

The Minnesota Tipboard Company argues that the Board did not comply with the small business requirements contained in Minn. Stat. 14.115, subds. 2 and 4. Subd. 2 of that section reads as follows:

> Subd. 2. Impact on small business. When an agency proposes a new rule, or an amendment to an existing rule, which may affect small businesses as defined by this

section, the agency shall consider each of the following methods for reducing the impact of the rule on small businesses:

(a) the establishment of less stringent compliance or reporting requirements for small businesses;

(b) the establishment of less stringent schedules or deadlines for compliance or reporting requirements for small businesses;

(c) the consolidation or simplification of compliance or reporting requirements for small businesses;

(d) the establishment of performance standards for small businesses to replace design or operational standards required in the rule; and

(e) the exemption of small businesses from any or all requirements of the rule. In its statement of need and reasonableness, the agency shall document how it has considered these methods and the results.

Several of these "methods" are either not applicable or go to the heart of the proposed rule, i.e., whether or not small businesses should have to comply with the rule requirements. Although the Board did not specifically address each of the five methods set forth in subdivision 2 above, the Statement of Need and Reasonableness shows that the Board did consider impact on small businesses in light of the necessity for uniform standards and rule compliance.

Subd. 4 of Minn. Stat. 14.115 reads:

Subd. 4. Small business participation in rulemaking. In addition to the requirements under section 14.14, the agency shall provide an opportunity for small businesses to participate in the rulemaking process, utilizing one or more of the following methods:

(a) the inclusion in any advance notice of proposed rulemaking of a statement that the rule will have an impact on small businesses which shall include a description of the probable quantitative and qualitative impact of the proposed rule, economic or otherwise, upon affected classes of persons; or

(b) the publication of a notice of the proposed rulemaking in publications likely to be obtained by small businesses that would be affected by the rule; or

(c) the direct notification of any small business that may be affected by the rule; or

(d) the conduct of public hearings concerning the impact of the rule on small businesses.

The Tipboard Company complains that it did not receive adequate notice or have

sufficient opportunity to consider and comment on rule provisions which affect
its operation. The Judge points out that the promulgation process for these rules extended over several years. An intent to solicit outside opinion was published in the State Register in April of 1988. The Tipboard Company

received a copy of the Notice of Hearing in this matter from the Board and had a full opportunity to comment on and discuss the proposed rules at the public hearing. It did not do so, however. Rather, its written comments were submitted on the last day for the receipt of comments. The Tipboard Company's major concern herein is Proposed Rule 7860.0230, subp. 12. That Rule is addressed, infra.

The Administrative Law Judge finds that the Board has complied with the "small business considerations" requirements contained in Minn. Stat. 14.115.

Nature of the Proposed-Rules

8. The Minnesota Charitable Gambling Control Board has proposed amendments to the current rules governing charitable gambling. The proposed amendments more specifically define the responsibilities of: organizations conducting lawful gambling; distributors selling lawful gambling equipment; manufacturers producing equipment for lawful gambling; and the Board and the Department of Revenue in their role as regulators of the nearly $8 million per year industry.

9. Many of the proposed rule provisions received no negative public comment and were adequately supported by the Statement of Need and Reasonableness. The Judge will not specifically address those rules in the discussion below and finds that the need for and reasonableness of those provisions has been demonstrated.2 The Judge will primarily discuss below specific issues concerning the need for, reasonableness of, or statutory authority for the proposed rules.

10. After a review of the testimony given at the hearing, the written comments submitted, and cross-referencing 1989 Laws, ch. 334, art. 2, the Board has proposed the following modifications to the proposed rules:

7860.001Q Definitions.

Subp. 16. Lawful Purpose.

Amend this subpart by adding items F and G which provide:

F. any expenditure by, or any contribution to._a hospital or nursing home exempt from taxation under section 501(c)(3) Qf the Internal Revenue Code;

2 In order for an agency to meet the burden of reasonableness, it must demonstrate by a presentation of facts that the rule is rationally related to the end sought to be achieved. Broen Memorial Home v. Minnesota Department of Human Services, 364 N.W.2d 436, 440 (Minn. App. 1985). Those facts may either

be adjudicative facts or legislative facts. Manufactured Housing Institute v.
Pettersen, 347 N.W.2d 238, 244 (Minn. 1984). The agency must show that a reasoned determination has been made. Manufactured Housing Institute at 246.

G. payment of reasonable costs incurred in complying with the performing of annual audits required under Minnesota Statutes section 349.19, subdivision 9.

Amend the remaining portion of the subpart as follows:

"Lawful purpose" does not include: the erection, acquisition, improvement, expansion, repair, or maintenance of any real property or capital assets owned or leased by the organization, other than a hospital or nursing home exempt from taxation under section 501(c)(31 of the Internal Revenue Code, unless the board specifically authorizes the expenditures after finding that the property or capital assets will be used exclusively for one or more of the purposes specified in items A to C; the expenditure of gambling funds for the purpose of influencing or attempting to influence any public official or the outcome of any public decision, other than an expenditure made pursuant to item E. or the expenditure of gambling funds for that acquisition of property, other than real property, the ownership or possession of which is retained by the organization, unless the property is used exclusively for one or more of the purposes specified in items A to C.

Subpart 20. Organization.

This subpart is amended as follows:

"Organization" means any fraternal, religious, veterans, or other nonprofit organization that has been in existence for the most recent three years and which has at least 15 active members, and either has beea-duly incorporated as a nonprofit organization for at least three years, or has been recognized by the Internal Revenue Service as exempt from income taxation for the most recent three years.

Subpart 26. Profit.

This subpart is amended as follows:

Cross Profit. "Gross Profit" means the gross receipts collected from lawful gambling, less reasonable sums necessarily and actually expended for prizes.

Add a new subpart 27, Net Profit, and renumber accordingly.

This subpart reads:

Net Profit. "net Profit" means gross profit less reasonable sums actually expended for allowable expenses.

7860.0150 Bingo Hall Licenses.

Subpart 1. License Required.

This subpart is amended as follows:

No person may lease a facility to more than one licensed individual, corporation, partnership. or organization to conduct bingo without having obtained a bingo hall license, unless the person lessor is a licensed organization.

Subpart 2. Application Required.

This subpart is amended by changing Item I as follows:

I. a statement as to whether any officer, director, or other person in a supervisory or management position:

(1) has been convicted of a felony in a state or federal court within the past five years or who has a felony charge pending; or

(2) has ever been convicted in a state or federal court of a gambling related offense within ten years of the date of license application felony involving fraud or misrepresentation or a crime involving gambling; and

Subpart 7. License Fee.

This subpart is amended as follows:

The annual fee for a bingo hall license is $250 $2500.

7860.0700 FINES.

Subp. 3. Appeals. An appeal . . . must schedule a hearing. The licensee has the burden of proving by substantial a preponderance of the evidence . . .

The above modifications have been made, in most part, to conform to the new language contained in the 1989 legislation referenced above. With the exception noted below in Finding 16, the Administrative Law Judge finds that the need for and reasonableness of each of the modifications above has been demonstrated and that none constitute a substantial change from the rules as initially proposed.

Discussion of the Proposed Rules

11. Parts 7860.0070. subp, la.: 7860.0160, subd. 1M.: 7860.0160, subp. 4D.

These rule provisions eliminate advertising expenses from the allowable expense category which are proper deductions against gambling proceeds. These proposed rules are supported in the Statement of Need and Reasonableness as follows:

> The Board proposes to amend this subpart [specifically referring to 7860.0070, subp. la.] by prohibiting the payment of advertising expenses from gambling proceeds. This amendment is necessary to prevent the commercialization of charitable gambling as required by Minn. Stat. 349.11 (1988). Although advertising of gambling events is not prohibited, advertising is, as a practical matter, negligible because it must be paid from monetary sources other than gambling proceeds. To allow advertising to be paid from gambling proceeds would result in a substantial increase in the commercialization of charitable gambling. In addition, advertising is expensive and, if used, will limit the amount of gambling proceeds dedicated to lawful purposes.
>
> The proposed amendment is reasonable because organizations are not prohibited from advertising, but are simply precluded from using gambling profits to pay for the expense of the advertising. While such a restriction, as a practical matter, eliminates the ability of many organizations to advertise, all organizations benefit from the lack of commercialization in the industry.

The Minnesota Newspaper Association argues that not allowing advertising expenses to be a permissible deduction from charitable gambling profits essentially prohibits most small organizations from advertising; and that this prohibition constitutes a violation of the First Amendment to the United States Constitution which guarantees freedom of speech and the press. Although advertising is "commercial speech" which can be regulated by the government, the Newspaper Association contends that this rule does not fall within the allowable parameters set by the United States Supreme Court in Central Hudson Gas & Electric Corporation v. Public Service Cgmmission, 444 U.S. 557 (1980). The Association thus urges that this proposed rule be stricken because it is violative of the United States Constitution.

In the Central Hudson decision, the United States Supreme Court adopted a four-part test by which to examine advertising restrictions in order to evaluate their constitutionality. The four parts of this test are:

> (1) whether the commercial speech in question deals with a lawful activity and is not misleading. If the activity is both lawful and the speech is not misleading, then the government's power is more limited;

(2) whether the governmental interest asserted in support of the restriction is substantial;

(3) whether the restriction imposed directly advances the governmental interest asserted; and

(4) whether the restriction goes no further than necessary to serve the governmental interest.

Central Hudson, 447 U.S. at 564.

In Central Hudson, the court held that a regulation of the New York Public Service Commission which completely banned an electric utility from advertising to promote the use of electricity violated the First Amendment to the Constitution. The four-part Central Hudson test has been used to determine the constitutionality of restrictions against advertising generally. let, Zauderer v. Office of Disciplinary Council of the Supreme Court of Ohio, 471 U.S. 626 (1985) (a ban on the use of illustrations in attorney advertisements was found to be unconstitutional); Posadas De Puerto Rico Associates v. Tourism Co., 106 S. Ct. 2968 (1986) (prohibitions against the advertising of casino gambling to Puerto Rico residents was found to be constitutional); and Minnesota Newspaper Association v. Postmaster General, 677 F. Supp. 1400 (D. Minn. 1987) (statute prohibiting the use of the mail to send newspapers containing advertisements for lotteries did not violate the First Amendment but the prohibition against the use of the mail to send newspapers containing prize lists for lotteries was unconstitutional).

The Board does not contend that the advertising done by charitable gambling organizations either concerns an unlawful activity or is misleading. Rather, the Board argues that the purpose of the advertising restriction is to implement the directive contained in Minn. Stat. 349.11 which states a legislative "purpose" to prevent "commercialization". The Board asserts that this legislative mandate is a "substantial" governmental interest and that the proposed rule will have the effect of restricting advertising, thus preventing commercialization. In addition, because the proposed rule does not prohibit advertising but only restricts the source of the funds that can be used to pay for advertising, the proposed rule is not overly restrictive. Charitable gambling organizations are free to advertise as long as the funds used to pay for those advertisements are raised through means other than the gambling activity itself.

3 In a very recently decided case, the United States Supreme Court held that a governmental restriction imposed on commercial speech does not have to be the least restrictive means of achieving the public interest asserted. Rather, the means must be narrowly tailored to achieve the desired objective and it is for governmental decision-makers to judge what manner of regulation may be employed. Board of Trustees of the State University of New York. et al. v. Todd Fox. et al., 1989 WL 69614 (U.S.) (decided June 29, 1989) pp. 5-11.

The Judge agrees with the Board's analysis and finds that the proposed rule does not violate the First Amendment to the United States Constitution. Two factors are significant in this determination. First, the legislature has stated that it is the purpose of the charitable gambling laws to prevent "commercialization". Minn. Stat. 349.11. This legislated purpose must be viewed as a "substantial" governmental interest. It is clear that the proposed rule will have the effect of at least reducing the level of advertising that charitable gambling organizations engage in. The reduction in advertising will result in a lessening of "commercialization". Second, the proposed rule is not a blanket ban on advertising. Although it may have the effect of severely restricting or perhaps even eliminating an organization's ability to advertise, advertising per at is not prohibited. If an organization desires to continue advertising, an additional source of funds will have to be found. There is insufficient evidence in the record to support the Newspaper Association's claim that the proposed rule will operate as a ban on advertising with respect to all or even most of the charitable gambling organizations. Minn. Stat. 349.15 provides clear authority for the Board to promulgate rules which specify "allowable expenses".

12. Part 7860.0100, subp. 1.

The last paragraph of this proposed rule states that "an organization shall not be granted a license when the proposed licensed premises is a site where illegal gambling has occurred or the lessor has been convicted of illegal gambling within the last 12 months." It is not clear whether the "12-month" criteria applies to the occurrence of illegal gambling in addition to the conviction provision. Obviously, if a single occurrence of illegal gambling had occurred on a site in 1942, it would be unreasonable to not grant a license based on this rule. The Statement of Need and Reasonableness states that the prohibition is intended to apply to any premises where illegal gambling has occurred within the last 12 months. However, because the rule could be read both ways, the Judge finds that need and reasonableness has not been demonstrated by the Board. In order to correct this defect, the rule should be clarified to read, ". . . the proposed licensed premises is a site where illegal gambling has occurred within the last 12 months or the lessor has been convicted of illegal gambling within the last 12 months." As modified, the Judge finds that the need for and reasonableness of the proposed rule has been demonstrated.

13. Part 7860.Q230, subp. 12.

This proposed rule sets forth requirements for the format of bingo cards that are not pre-printed but are completed by the player. The rule states that

each card is to contain five horizontal rows of spaces and that the central row
must contain the word "free" marked in the center space. Additionally, all remaining spaces must be of uniform color and size. The Board supports this new rule in its Statement of Need and Reasonableness as follows:

> This subpart sets forth the format of bingo cards in use throughout the State of Minnesota. A substantial number of questions have arisen regarding the use of bingo cards which are not pre-printed but are filled in by the player at the bingo occasion. The proposed amendment is consistent with the definition of a bingo card as

> contained in Minn. Stat. 349.12, subd. 4 (1988). That statute requires a bingo card to contain 25 spaces with the center space in the middle row having the word "free" printed on it. In any bingo game, the particular arrangement of numbers on the bingo card must be clearly described and announced to the players immediately before each game is begun. In the absence of the announcement, any combination of five spaces in a row, vertically, horizontally, or diagonally, could be used to win the bingo game. If the spaces on the bingo card are not uniform in color and size, then the card would not be an acceptable bingo card, and would not conform to the rules of the game. This rule is needed and reasonable to eliminate a substantial amount of confusion with respect to the format of bingo cards.

The Minnesota Tipboard Company argues that because this rule would eliminate the use of shaded bingo paper, which is one kind of paper manufactured by them, the rule is not reasonable due to the economic burden it imposes. Additionally, the Tipboard Company contends that the rule conflicts with Minn. Stat. 349.12, subd. 4.

The Board has stated several legislative-type facts as the rationale for this proposed rule. (Set, footnote 2, supra.) The Administrative Law Judge finds that those "facts" sufficiently demonstrate the need for and reasonableness of the proposed rule. The Tipboard Company has made no showing of the actual economic detriment it will experience if it is foreclosed from selling shaded bingo paper.

Minn. Stat. 349.12, subd. 4 reads as follows:

> Subd. 4. "Bingo" means a game where each player has a card or board for which a consideration has been paid containing five horizontal rows of spaces, with each row except the central one containing five figures. The central row has four figures with the word "free" marked in the center space thereof. Bingo also includes games which are as described in this subdivision except for the use of cards where the figures are not preprinted but are filled in by the players. A player wins a game of bingo by completing a preannounced combination of spaces or, in the absence of preannouncement of a combination of spaces, any combination of five spaces in a row, either vertical, horizontal or diagonal.

The Tipboard Company argues that the exception for cards "where the figures are not pre-printed" should be read to allow the use of cards having any other format than the format designated for the pre-printed cards. The Judge disagrees. The Judges reads language just referenced as meaning only that the cards do not have pre-printed figures but are identical to "regular" bingo

cards in all other respects. Consequently, the Judge finds that the proposed rule does not conflict with Minn. Stat. 349.12, subd. 4.

14. Part 7860.0300, subps. 1A. and 2I.

This proposed rule sets forth standards for pull-tab and tipboard tickets. However, both subparts require that the rule "shall be effective April 1, 1989". This effective date will make the standards set forth in the rules retroactive to April 1, 1989. However, either a rule itself or an authorizing statute must state that retroactivity is intended because rules are presumed to have no retroactive effect unless clearly and manifestly so stated. Mason v. Farmers Insurance Companies, 281 N.W.2d 344, 348 (Minn. 1979). Rules will be found to be invalid if their retroactivity is unreasonable in the circumstances. 2 Davis, Administrative Law Treatise, (2d Ed.) 7.23, p. 109. In this case, the Judge finds that the retroactive application of standards to April 1, 1989, when the proposed rules may not be adopted until July or August of 1989, has not been shown to be reasonable. Additionally, there is no stated intention in either the rule or authorizing statute that the rule should be made to be retroactive. Thus, the rules violate substantive law. In order to correct this defect, the "effective" date sentences should be deleted from each of the subdivisions referenced above. Then, the rule and standards referenced will become effective five working days after Notice of Adoption is published in the State Register. Minn. Stat. 14.18 (1988).

15. Part 786Q.0700, subp. 3.

This subpart sets forth the appeal rights of persons or entities who have been assessed fines by the Board for the violation of Minn. Stat. Ch. 349 or the Board's rules. However, the second paragraph of that subdivision states that "Appeals of proposed fines may be referred by the Board to the compliance review group for purposes of a hearing."" (Emphasis added.) Use of the word "may" in this rule provision allows the Board "unbridled discretion" as to whether or not it will schedule a hearing when a fine is contested. This "unbridled discretion" is a violation of substantive law and is a defect in the rule. see, Minn. Rules Drafting Manual, 1984 Ed., pp. 18-19. In order to correct this defect, the word "may" must be replaced with the word "shall".6

4 The Minnesota Tipboard Company raised several other legal arguments concerning the promulgation process and "adoption" of the proposed rules. These issues are outside of the scope of this proceeding. Consequently, they will not be addressed herein. see, Minn. Stat. 14.50 (1988).

5 1989 Laws, Ch. 343, art. 2, 17 specifically exempts these hearings from the Administrative Procedures Act, Ch. 14.

6 The proposed rules use the word "may" in several other rule provisions.

However, use of the word "may" is permissible when used in the context of "has
authority to". However, when the discretion involves rights or benefits that accrue to those regulated, use of the word "may" is improper.

With the exception noted below, the Judge finds that the need for and reasonableness of the above-referenced subpart has been shown by the Board.

16. Part 786Q,0700. subp, 3.

This subpart has been amended by the Board to provide that if a hearing on a fine is held, "the licensee has the burden of proving by a preponderance of the evidence that the payment of a fine is inappropriate." In its statement of its need and reasonableness, the Board states that, "The proposed appeal procedure comports with due process as well as other administrative appeal procedures used throughout the State." However, the proposed rule places the burden of proof squarely on the one who has been fined to show that the fine is inappropriate. Neither the rule nor the statute require the Board to make any initial showing that there is a reasonable basis or justifiable cause for the imposition of the fine. ate, Minn. Stat. 245A.08, subd. 3 (1988); Sanford, et al. v. Rockefeller, 364 N.Y. Supp. 2d 450 (N.Y. Ct. App. 1974). The proposed rule is not, as the Board states, consistent with due process and other administrative appeal procedures used throughout the State.

The rules of the Office of Administrative Hearings, specifically 1400.7300, subp. 5, provides that "the party proposing that certain action be taken must prove the facts at issue by a preponderance of the evidence, unless the substantive law provides a different burden or standard." Absent specific statutory authority, the Board cannot, by rule, create "substantive law" which provides a different burden. It is an inherent principle in both the judicial and quasi-judicial systems that the party initiating an action or proposing an action be taken has the burden of proof on the issues which must be decided. ate, Dittrich v. Brown County, 9 N.W.2d 510, 516 (Minn. 1943). The Administrative Law Judge finds that the Board has not documented its statutory authority to promulgate the 7 proposed rule and that the rule, as proposed, violates basic due process. In order to correct the defect, the sentence placing the burden of proof on the appellant must be stricken. As so modified, the Judge finds that the need for and reasonableness of subpart 3 has been demonstrated by the Board.

Based upon the foregoing Findings of Fact, the Administrative Law Judge makes the following:

CONCLUSIONS

1. That the Minnesota Charitable Gambling Control Board gave proper

notice of the hearing in this matter.

2. That the Board has fulfilled the procedural requirements of Minn. Stat. 14.14, subds. 1, la and 14.14, subd. 2, and all other procedural requirements of law or rule.

7 see, $345.QO in U.S. Currency v. District of Columbia, 544 A.2d 680 (D.C. App. 1988); U.S. v. $250.000 in U.S. currency 808 F.2d 895 (1st Cir. 1987).

3. That the Board has demonstrated its statutory authority to adopt the proposed rules and has fulfilled all other substantive requirements of law or rule within the meaning of Minn. Stat. 14.05, subd. 1, 14.15, subd. 3 and 14.50 (i)(ii), except as noted at Findings 14, 15 and 16.

4. That the Board has documented the need for and reasonableness of its proposed rules with an affirmative presentation of facts in the record within the meaning of Minn. Stat. 14.14, subd. 2 and 14.(iii), except as noted at Findings 12 and 14.

5. That the amendments and additions to the proposed rules which were suggested by the Board after publication of the proposed rules in the State Register do not result in rules which are substantially different from the proposed rules as published in the State Register within the meaning of Minn. Stat. 14.15, subd. 3, and Minn. Rule 1400.1000, subp. 1 and 1400.1100.

6. That the Administrative Law Judge has suggested action to correct the defects cited in Conclusions 3 and 4 as noted at Findings 12, 14, 15 and 16.

7. That due to Conclusions 3 and 4, this Report has been submitted to the Chief Administrative Law Judge for his approval pursuant to Minn. Stat. 14.15, subd. 3.

8. That any Findings which might properly be termed Conclusions and any Conclusions which might properly be termed Findings are hereby adopted as such.

9. That a finding or conclusion of need and reasonableness in regard to any particular rule subsection does not preclude and should not discourage the Commission from further modification of the proposed rules based upon an examination of the public comments, provided that no substantial change is made from the proposed rules as originally published, and provided that the rule finally adopted is based upon facts appearing in this rule hearing record.

Based upon the foregoing Conclusions, the Administrative Law Judge makes the following:

RECOMMENDATION

It is hereby recommended that the proposed rules be adopted except where specifically otherwise noted above.

Dated this 6 day of July, 1989.

PETER C. ERICKSON
Administrative Law Judge